No. 632

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In the Supreme Court of the United States

October Term, 1955

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JACK P. BLUME,
1001 Connecticut Ave., N. W.,
Washington 6, D. C.
Attorney for Petitioners.

BERNARD REICH and
MORRIS E. COHN,
328 South Beverly Drive,
Beverly Hills, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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46 Yale Law Journal (1937), pp. 421, 424-425, McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholders, Suit 11

In the Supreme Court of the United States

October Term, 1955

No. .....

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 3, 1955.

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*Three of the named petitioners, Eli B. Castleman, Marion V. Castleman and Louis Feuerman, have not authorized the filing of this petition. They are minority stockholders who, it was charged below, consented to a dismissal of the representative stockholder action to the prejudice of other stockholders of the same class. Please see, *infra*, pages 4, 10, 11, 12.

Opinions Below.

The *Per Curiam* Opinion of the Court of Appeals filed November 3, 1955, is unreported and is printed in Appendix A.

The Memorandum (opinion) of the District Court filed August 5, 1954, is unreported and is printed in Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 3, 1955, and is printed in Appendix C. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

1. Whether a Federal court does not radically depart from the accepted course of judicial proceedings in a stockholders' action by refusing to rule on motions, by postponing the case because of, and until after the determination of, a subsequently-filed foreign state action, and finally by dismissing the case for *res judicata* while refusing to hear and determine defenses that the foreign judgment was obtained by collusion in a feigned adversary proceeding.

2. Whether a Federal court may render moot a timely petition to intervene as of right by dismissing the action without ruling on the petition.

3. Whether a sale by a corporation of all of its assets to a defendant officer in a representative stockholder action renders moot the said action against him.

Constitutional Provision and Statutes Involved.

The following provision of the Constitution and the statutes involved are set forth in Appendix D: Constitution, Article IV, Section 1; 28 U. S. C., §1738; Federal Rules of Civil Procedure, Rules 23(b), (c), Rule 24.

Statement.

It is respectfully submitted that this case is of major concern to the integrity of the Federal judicial process.

In December, 1952 the present action was instituted (jurisdiction being founded in diversity under 28 U. S. C., Sec. 1332) in the United States District Court for the Southern District of California. The action was a secondary or representative stockholders' suit in behalf of all stockholders of RKO Pictures, Inc. and RKO Radio Pictures, Inc., principally against Howard R. Hughes* for waste and mismanagement. Damages were estimated at over $38,000,000. [R. 266.]

Eli B. Castleman and Marion V. Castleman and Louis Feuerman, holders of some 2500 shares out of the 4,000,000 shares outstanding, were the nominal plaintiffs; their New York attorneys, Louis Kipnis and Leo B. Mittelman, retained Bernard Reich, a California attorney, to bring the action, and throughout the proceedings below Reich was the only attorney of record for the plaintiffs.

Shortly afterward, the New York attorneys (without Reich's knowledge) reached a private agreement with the defendant Hughes, concerning the settlement of the con-

*This defendant, appellee below and respondent here, filed no brief in the Court of Appeals. There he was "defended" by the nominal plaintiffs supposed to be suing him and the nominal defendant RKO for whose benefit the suit was supposed to have been brought originally. Moreover, Hughes never testified in person in any of the stockholder actions anywhere.

troversy. To consummate their agreement they conspired to obtain a judgment in an ostensibly adversary, collusive action in Nevada. To this end Hughes purported to move to Las Vegas, Nevada, and an action was commenced by New York counsel (without Reich) in the Eighth Judicial District Court of the State of Nevada. [R. 249, 47, 94, 95, 97, 139.]

Because Reich was not a party to the conspiracy and because, as will be seen, when he learned of it he sought to bring the facts before the United States District Court, the parties to the conspiracy tried to dismiss the California action and to discharge Reich from the case. On June 26, 1953, without the knowledge or consent of Reich, the attorney of record for plaintiffs in the California action, the District Court, at the instance of the defendants and plaintiffs' New York counsel, dismissed the California action. [R. 50-55.]

This dismissal of the action, plainly improper, was set aside by the District Court at Reich's insistence on October 5, 1953 [R. 72], but the District Court made its abdicating position clear as early as October 19, 1953, as follows [R. 370]:

> "The Court: May I say just a word? Counsel has done a lot of talking on both sides in this case, but as far as this court is concerned it is going to put this case to sleep until the Nevada case is determined.
>
> "I am not going to hear it and I am not going to do anything with it that I don't have to do.
>
> "This case is pending in Nevada and I understand it is at issue over there. * * * I think as long as they have started through the wringer over there

and that court has jurisdiction of the parties, I am not going to bother with this mess.

"You can fire him [Reich] or not, or he can just sit here and wait. If I don't die of old age first maybe he will."

The District Court below, in accordance with its announced attitude, refused to act. It continued and otherwise refused to act on motions made by Reich in behalf of plaintiffs to set aside the quashing of service of process on Hughes, for the appointment of a Special Master to investigate, and for leave to take the deposition of the defendant Hughes. [R. 118, 121, 122, 173, 181, 205, 207, 317, 351.] Even though the District Court had been apprised of the contention that the Nevada action was collusive and that to protect the interests of the stockholders it was necessary that other stockholders be permitted to intervene, the Court continued and refused to act on the petition to intervene filed by Reich in behalf of Julius and Eleanor November. [R. 205, 207, 317, 351.]

On February 7, 1954, Hughes offered to purchase from RKO "all of its assets as of the date of transfer to (him), including any and all claims or causes of action of every kind or character against, or which might be asserted against, any person or persons including (him)", and moved the Nevada state court for a dismissal on the ground of mootness, in that the anticipated purchase of the assets of RKO, including the stockholder claims against him, would render the claims moot. [R. 200, 243.]

The purchase price was something more than 23 million dollars [R. 219] and some 15 millions less than was involved in damages in the action below. [R. 266.]

Although the notice to the stockholders was limited to the motion to dismiss for mootness because of Hughes'

offer to purchase [R. 200], the Nevada court, on April 1, 1954, after making findings of fact and conclusions of law wholly in favor of Hughes on the merits, dismissed the action as if there had been a trial or in any event a compromise. [R. 222, 255-257.]

The plaintiffs in the Nevada action, being the same parties below, did not oppose Hughes' motion to dismiss and on April 15, 1954, were awarded $160,000.00 for attorneys' fees and costs. [R. 238, 240.]

Prior to the Nevada judgment a Delaware court in *Schiff v. RKO Pictures Corporation,* 104 A. 2d 267 (1954), had refused, at the instance of other stockholders, to enjoin the sale of RKO assets to Hughes.

After the judgment in Nevada, RKO moved the District Court below to dismiss on the ground of *res judicata,* and over the opposition of Reich and the proposed intervenors,* but not of the plaintiffs, and after the Court had refused to permit the action to continue, it granted the motion to dismiss not only on the ground of *res judicata,* but on the further ground that the sale of RKO assets to Hughes rendered the action herein moot. [App. B.]

The posture of the litigation at that stage was as follows: a Delaware court had refused to enjoin the sale to Hughes of RKO's assets; a Nevada state court had made a final determination, purportedly on the merits and in particular on the ground that the sale of RKO's assets

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*Petitioners November herein who had sought to intervene before the District Court as far back as March 11, 1954. Because their petition was never determined the Court of Appeals indicated that they were never parties to the action. [App. A.] They were denied intervention likewise in Nevada. [R. 258.]

had compromised the action; the District Court below had refused to try the issues attacking the Nevada judgment as collusive and fraudulent and had dismissed the action.

No court in any adversary proceeding had examined the charges that the Nevada action was a fraud, which if true constituted a gross imposition on the court below. Accordingly, Reich filed an appeal from the dismissal—without the authority of the nominal plaintiffs,* but with the authority of the proposed intervenors.

Among the errors specified to the Court of Appeals were the following:

> "1. In dismissing the action . . . before hearing and determining the defenses of collusion and the absence of a truly adversary proceeding in Nevada.
>
> "2. In ruling that the final judgment in the Nevada action was *res judicata* and compelled dismissal of the action herein.
>
> "3. In ruling that the Delaware action rendered the action herein moot and compelled its dismissal.
>
> "4. In refusing to try the case, in continuing it indefinitely, putting matters off calendar, refusing to rule on motions, and finally dismissing the case with motions and petitions pending and undetermined.
>
> "5. In failing to grant the timely motion and petition of appellants November to intervene in the action.
>
> "6. In failing to grant timely motions including:
>
> "(a) The whole of plaintiff's motion to vacate order of dismissal made June 26, 1953;

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*Please see *Young v. Higby Company*, 324 U. S. 204, 210-213 (1945), and *Whitten v. Dabney*, 171 Cal. 621, 630-632 (1915).

"(b) Motion to vacate in part Order entered January 12, 1954;

"(c) Motion for appointment of Special Master."

The Court of Appeals' *Per Curiam* Opinion ignored the errors designated 1, 4, 5 and 6, and affirmed. Without citation of authority it ruled that the Nevada action was *res judicata* and the California action below moot. It (foot)noted that the record did not bear out the contention of collusion, and this notwithstanding that there was never a trial of the issue and the record before the Court was almost one-sided in favor of collusion. [R. 45-57, 95-115, 137-172, 245, 249-253.] It (foot)noted, furthermore, that because the Novembers' petition to intervene was not acted upon, the Novembers at no time became parties to the cause.

Reasons for Granting the Writ.

1. The Court of Appeals for the Ninth Circuit has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

It is submitted that the Court of Appeals sanctioned procedures which denied to the stockholders, and to the proposed intervenors, the elementary requisites of due process, to wit, a hearing on the issues of fact presented, and which sanctioned abandonment by the District Court of its judicial functions.

Moreover, the ordinary stockholder being powerless to deal with insiders, and the relationship between management and stockholders not being, by itself, conducive to confidence, it has become increasingly important that there

be *potential* scrutiny by the court in representative stockholder actions, especially in connection with charges of personal aggrandizement at the expense of the company. Enlightened corporate enterprise faces up to this scrutiny. By rule and decision,* a company in such litigation becomes essentially a ward of the court. Proposed settlements particularly require airing before becoming effective. The exercise of judicial examination is vital to the stability of corporate enterprise; and the refusal of a court to act in a given case does general injury.

The courts below have departed from established rules by accepting the determination of another court selected by the defendants and by refusing to examine serious charges concerning the good faith of that litigation. The sport of unseating courts from jurisdiction of such a case, the spectacle of the accused officer "buying" the company's assets, including the lawsuits against him, resemble the crudities of early corporate enterprise. Such practices should not be sanctioned.

A. The Court of Appeals in this case sanctioned the District Court's abdication of its jurisdiction to a state court, contrary to sound judicial procedure.**

McClellan v. Carland, 217 U. S. 268, 281-282 (1910);

Willcox v. Consolidated Gas Co., 212 U. S. 19, 40 (1909);

Bedgisoff v. Cushman, 12 F. 2d 667, 668 (C. C. A. 9, 1926);

In re Howard, 130 F. 2d 534 (C. C. A. 5, 1942);

Schwab v. Coleman, 145 F. 2d 672, 677, 678 (C. C. A. 4, 1944).

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*Cf. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541, 547 (1949).

**Corresponds to Questions Presented "1," *supra,* p. 2.

In the *McClellan* case, *supra,* the Supreme Court had before it for review an order below staying an action pending, also a subsequently-filed state action. The Court stated (217 U. S. at pp. 281-282):

> "It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but, by the orders made in this case, the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata,* and thus prevent further proceedings in the Federal court.
>
> * * * * * * * *
>
> ". . . In the present case, so far as the record before the circuit court of appeals discloses, . . . the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this . . ."

B. The Court of Appeals sanctioned the District Court's renunciation of its duty to ferret out fraud and collusion in representative stockholder actions.*

Federal Rules of Civil Procedure, 23 (c);

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 548, 549 (1949);

Young v. Higby Company, 324 U. S. 204, 210-213 (1945);

Universal Oil Products Company v. Root Refining Company, 328 U. S. 575, 578, 580, 581 (1946);

Certain-Teed Products Corporation v. Topping, 171 F. 2d, 241, 243 (C. A. 2, 1948);

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*Corresponds to Questions Presented "1," *supra,* p. 2.

Cohen v. Young, 127 F. 2d 721, 724, 725 (C. C. A. 6, 1942);

See also:

Winkelman v. General Motors Corporation, 48 Fed. Supp. 490, 493 (D. C. S. D., N. Y., 1942);

Whitten v. Dabney, 171 Cal. 621, 630-632 (1915);

McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholders' Suit, 46 Yale L. J. 421, 424, 425 (1937).

In *Cohen v. Beneficial Industrial Loan Corp., supra,* this Court stated (337 U. S. at p. 549):

> "Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. It is not without significance that this Court has found it necessary long ago in the Equity Rules and now in the Federal Rules of Civil Procedure to impose procedural regulations of the class action not applicable to any other."

In *Winkelman v. General Motors Corporation, supra,* the District Court stated (48 Fed. Supp. at p. 493):

> "The purpose of the notice required by the Rule is stated by Judge Allen in Cohen v. Young, 6 Cir.,

127 F. 2d 721, at page 725, as follows: '* * * the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders. Cf. McLaughlin, op. cit., supra.'

* * * * * * * *

"'The role of the court is to see that the compromise is fair and reasonable under the circumstances and that no collusion or fraud has been practiced in the consummation of the settlement.'"

In *Whitten v. Dabney, supra,* the California Supreme Court on a motion to dismiss the appeals on the ground of a compromise of a representative stockholder suit stated (171 Cal. at p. 630):

"* * * [T]hese plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. * * * He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* * * * And yet we find in this agreement the plaintiffs declaring that there has been a complete settlement and adjustment 'of all claims of the plaintiffs against Miley and Dabney as set forth in plaintiffs' complaint.' What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other.

* * * * * * * *

". . . Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction."

Yet, it would appear to be the sense of the opinions below that the nominal plaintiffs had as complete control of this representative litigation as if they were dealing with their own property.

C. The Court of Appeals in this case sanctioned the District Court's refusal to hear the attack made before it on the Nevada judgment for fraud, collusion, and the absence of an adversary proceeding.*

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878);

Earl of Bandon v. Becher, 3 Clark & F. 479-512 (6 Eng. Rep. 1517) (1835);

Duchess of Kingston's Case, 20 Howell State Trials 355, 478, 479 (1776).

In *United States v. Throckmorton, supra,* the Court stated (98 U. S. at pp. 65-66):

> "But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case . . . or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases *which show that there has never been a real contest in the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and upon the case for a new and a fair hearing." (Emphasis added.)

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*Corresponds to Questions Presented "1," *supra,* p. 2.

In the *Earl of Bandon* case, the English court quoted from the *Duchess of Kingston* case as follows (6 Eng. Rep. at p. 1529):

> "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. . . ."

On its own the English court case stated:

> "It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; and it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

It appears to be the sense of the Memorandum in the District Court and the *Per Curiam* Opinion in the Court of Appeals that the plaintiff-shareholders exclusively controlled the action and that it was not the duty of the District Court, or of the Court of Appeals, or of counsel to unearth and expose a fraud. The courts below, contrary to what this Court said in *Universal Oil Products Company v. Root Refining Company,* 328 U. S. 575, 578, 580, 581 (1946), did not feel it encumbent on the trial court to hold a hearing on the question as to whether fraud had been practiced upon it or whether "the very temple of justice had been defiled."

2. The Court of Appeals, in sanctioning the District Court's abdication of its jurisdiction to a state court, has decided an important federal question in a way in conflict with applicable decisions of this Court and with other Courts of Appeal on the same matter.*

****McClelland v. Carland*, 217 U. S. 268, 281-282 (1910);

Willcox v. Consolidated Gas Co., 212 U. S. 19, 40 (1909);

Western Union v. United States & M. T. Co., 221 Fed. 545, 550 (C. C. A. 8, 1915).

Please see citations under 1 A, *supra.*

In *Willcox v. Consolidated Gas Co., supra,* this Court stated:

> ". . . When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404, 5 L. ed. 257, 291). * * * The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

In *Western Union v. United States & M. T. Co., supra,* the Eighth Circuit Court (221 Fed. at p. 550) stated:

> ". . . *the averments of the cause of action invoked the undoubted power and duty of that court to hear and determine the issues* tendered thereby on their merits, a power and duty which it might not lawfully renounce or avoid; for 'the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them in every case to which their jurisdiction extends. *They cannot abdicate their authority or duty in any case in favor of another jurisdiction.*'" (Emphasis added.)

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*Corresponds to Questions Presented "1," *supra*, p. 2.

**Please see, *supra*, p. 10.

3. The Court of Appeals, in sanctioning the District Court's application of Full Faith and Credit and *res judicata* to a collusive (so alleged but untried) judgment, has decided an important federal question in a way in conflict with applicable decisions of this Court.*

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878);

Hansberry v. Lee, 311 U. S. 32, 40, 45 (1940).

Please see citations under 1 A, *supra.*

Please see also Note, *Binding Effect of Class Actions,* 67 Harv. L. Rev. 1059-1060 (1954), in which it was stated:

> "It should be noted that the binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action.
>
> "*Adequate Representation* — The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. Where, however, the interests of absent class members have not been adequately represented, binding them by class judgment would seem to offend the

*Corresponds to Questions Presented "1," *supra,* p. 2.

requirements of due process. [Hansberry v. Lee, 311 U. S. 32, 40 (1940).] Thus, the class action in which the class representatives colluded with the common adversary can have no effect upon those who did not participate."

4. The Court of Appeals, in ruling that the District Court's inaction on the petition of the Novembers to intervene as of right gave them no rights as parties, has decided an important federal question in a way in conflict with applicable decisions of this Court and with other Courts of Appeal on the same matter.*

Cf. Allen Calculators, Inc. v. National Cash Register, 322 U. S. 137 (1944);

Wolpe v. Poretsky, 144 F. 2d 505, 508 (C. A. Dist. of Col., 1944), cert. den. 323 U. S. 777 (1944);

Cohen v. Young, 127 F. 2d 721, 724 (C. C. A. 6, 1942);

Western Union v. United States & M. T. Co., 221 Fed. 545, 552 (C. C. A. 8, 1915).

In *Wolpe v. Poretsky, supra,* the court held that intervention could be had even after a final decree. It stated (144 F. 2d at p. 508):

"The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here at least one of the rights which cannot be protected without intervention is the right of appeal. The court was, therefore, in error in denying appellants leave to intervene as a matter of right.

"In their motion to intervene appellants relied solely on Rule 24(b) of the Federal Rules of Civil

*Corresponds to Questions Presented "2," *supra,* p. 2.

procedure, which relates to permissive intervention. However, had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. * * *

"When they filed their petition for intervention appellants had all the rights of a party at that stage of the proceedings. This, of course, includes the right of appeal. Since the time for appeal had not expired when appellants sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise at the time their intervention was filed." (Emphasis added.)

The District Court refused to hear and determine the petition of appellants November to intervene in the action. Contrary to the above cited cases, the Court of Appeals (foot)noted that because the District Court failed to act on the petition to intervene, the Novembers never became "parties to the cause."

5. The Court of Appeals, in deciding that the purchase by defendant Hughes of all of the assets of RKO rendered the secondary shareholder action moot, has decided an important question of federal law which has not been, but should be, decided by this Court.*

The question is one of law: may an officer and stockholder sued for fraud and mismanagement by other stockholders defeat jurisdiction of an action against him by buying up all of the assets from the corporation purportedly including stockholder derivative causes of action.**

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*Corresponds to Questions Presented "3," *supra*, p. 2.

**For the facts, please see *Schiff v. RKO Pictures Corp.* (Del.), 104 A. 2d 267, which refused to enjoin the sale to Hughes and to which the Court of Appeals refers. [R. 392].

Only one case, to wit, *Webster Eisenlohr, Inc. v. Kalodner*, 145 Fed. 316 (C. C. A. 3, 1944), cert. den., 325 U. S. 867 (1945), was cited by respondents to the courts below. There a preferred stockholder brought a minority action to protect the voting rights of all preferred stockholders. During the course of the proceedings the corporation offered to buy up the preferred shares. Plaintiff accepted the offer and his attorney, after being compensated, announced to the court that he had no client. The trial court, suspicious of the circumstances, appointed a Special Master. On appeal the appointment was vacated, but Circuit Judge Biggs, in the course of his dissenting opinion, stated that if all of the preferred stock had been purchased or obtained (it had not), the case was compromised and was ripe for dismissal—not moot, for "no matter by what course the suit proceeds or is dismissed, the approval of the District Court is necessary." (145 F. 2d at p. 326.)*

Except for this case, petitioners have not been able to find any case in point on this issue of alleged mootness; nor, for that matter, have petitioners been able to find a case which holds that a stockholder derivative action is even assignable or saleable to anyone, particularly to the executive accused.

The holding below that the sale of all assets of a corporation to the accused officer renders a secondary stockholder suit moot and therefore a F. R. C. P. 23(c) hearing in that suit unnecessary, constitutes, it is respectfully submitted, an important innovation warranting review by this Court.

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*Especially herein, since in the case of the sale of assets consent of individual stockholders is not required.

Conclusion.

These facts in the instant case excite scrutiny:

1. The steadfast inaction by the District Court in favor of a suit filed afterward in a selected foreign state jurisdiction;

2. The refusal of the court to entertain issues or otherwise to try charges that the Nevada judgment, asserted by defendants as a bar, was in fact collusive and an imposition on the courts;

3. The refusal of the courts below to recognize the absolute right of intervention in a representative stockholders' action, particularly where collusion is charged.

4. The disposition of the stockholders' action on the basis of purchase by the person charged with the wrongdoing.

All of these were sanctioned by the Court of Appeals for the Ninth Circuit. Of these, the refusal of the District Court to hear or to determine issues, particularly in a stockholders' action, and affirmance by the Court of Appeals, appear most grave.

The supervisory function by the Supreme Court of the judicial system of the United States is recognized in its Rule 19(1)(b). Petitioner respectfully urges that this is a case which calls for that supervisory power.

Respectfully submitted,

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JACK P. BLUME,
Attorney for Petitioners.

BERNARD REICH and
MORRIS E. COHN,
Of Counsel.